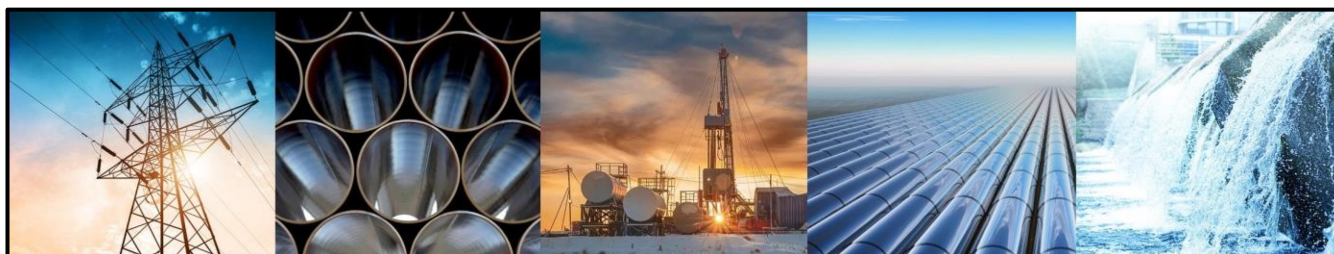
REGULATORY LAW CHAMBERS

ISSUE: MAY 2024 DECISIONS



ENERGY REGULATORY REPORT

This monthly report summarizes matters under the jurisdiction of the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC") and the Canada Energy Regulator ("CER") and proceedings resulting from these energy regulatory tribunals. For further information, please contact a member of the RLC Team.

Regulatory Law Chambers ("RLC") is a Calgary based boutique law firm, specializing in energy and utility regulated matters. RLC works at understanding clients' business objectives and develops legal and business strategies with clients, consistent with the legislative scheme and public interest requirements. RLC follows a team approach, including when working with our clients and industry experts. Visit our website to learn more about RLC.

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ALBERTA COURT OF APPEAL

***Judd v Alberta Energy Regulator*, 2024 ABCA 154**
Appeal – Production of Records

Application

Michael Judd ("Appellant") appealed a decision by the Alberta Energy Regulator ("AER") that denied his pre-hearing motion in a regulatory appeal of a pipeline licence issued to Pieridae Alberta Production Ltd. ("Pieridae"). The motion sought disclosure of information obtained by the AER under two of its directives: *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* ("*Directive 067*") and *Directive 088: Licensee Life-Cycle Management* ("*Directive 088*").

Decision

The Alberta Court of Appeal ("ABCA") allowed the appeal and referred the matter back to the AER for further consideration and redetermination. The ABCA determined that the AER erred by confining itself to information it had received under AER *Directive 056: Energy Development Applications and Schedules* ("*Directive 056*") and that the Appellant was entitled to the production of records that were relevant and material to the issues set out in the scoping decision for the hearing regardless of the process by which the AER received them.

Pertinent Issues

The AER granted, pursuant to *Directive 056*, Pieridae's application for a licence to construct and operate a 0.64 km pipeline to transport sour natural gas with a hydrogen sulfide (H2S) concentration of 32% from an existing wellsite to an existing pipeline tie-in point. The AER issued Pipeline Licence No. 62559 ("Licence") to Pieridae.

The AER granted the Appellant's request for a regulatory appeal of the decision to issue the Licence. The AER panel of hearing commissioners assigned to the regulatory appeal ("Panel") determined that the regulatory appeal would address the following four issues:

1. The determination of the Emergency Planning Zone for the pipeline, including the methodology used and the applications of AER Modelling requirements;
2. Emergency preparedness and proposed public protection measures;
3. The construction and operation of the pipeline, including the design and monitoring of the pipeline and the pipeline Integrity Management Program; and
4. The potential effects of the pipeline on the environment.

The Panel rejected the consideration of the following additional issues proposed by the Appellant:

1. Liability – legal uncertainty on the allocation of liability in the case of an H2S release event, as well as abandonment, reclamation and other clean-up costs;
2. *Directive 067* Information – disclosure of information received by the AER under *Directives 067* and *088* in relation to the application for the Pipeline, and the AER's evaluation of that information;
3. Pieridae's Financial Capability – Pieridae's financial capacity to safely and responsibly manage the proposed Pipeline and the associated infrastructure or to address the current and future abandonment and reclamation liabilities associated with the Foothills Assets and their other assets; and
4. Shell – Pieridae Sale Agreement – consent from Shell to construct and operate the pipeline.

The Appellant brought a motion seeking an order for further disclosure and access to all information collected, received, assessed, compiled or produced by the AER under *Directive 067* and *Directive 088* about the application, the Licence and the holistic licensee assessment of Pieridae and its eligibility to acquire and hold a licence for energy development in Alberta.

The Panel denied the Appellant's motion on the basis that the requested information was not relevant and material to the regulatory appeal, holding that the determination of licence eligibility under *Directive 067* and the holistic licensee assessment under *Directive 088* were separate regulatory processes from deciding an application for a new pipeline licence ("Motion Decision").

The ABCA granted permission to appeal the Motion Decision on the following question of law:

> [W]hen the panel considered whether the information requested by Mr. Judd was relevant and material to the issues in the regulatory appeal did they err in law by effectively confining themselves to the information obtained by the AER under *Directive 056*?

Applying a standard of correctness, the ABCA determined that the Panel misinterpreted the legislative scheme when it treated the separation of its regulatory processes as determinative of what was relevant and material to the regulatory appeal. The Panel's emphasis on the separation of the application process under *Directive 056* from the licence eligibility and holistic licensee assessments under *Directive 067* and *Directive 088*, respectively, misdirected its analysis, causing the Panel to wrongly conclude that the information sought by the Appellant was not relevant and material to the issues in question.

The ABCA stated that, contrary to the legislative scheme, the Panel treated the information obtained under each of these directives as categories, with information obtained under one being irrelevant to proceedings under another. According to the ABCA, the purpose and wording of *Directive 067* and *Directive 088* show that information gathered by the AER under these directives can be relevant and material in the context of other AER proceedings, including regulatory appeals of decisions to issue new licences.

The ABCA noted that the AER was entitled to limit the parameters of the appeal and that not every appeal must be holistic. When considering whether information is relevant and material to the regulatory appeal, the Panel is entitled to consider the issues that have been included and those that were expressly excluded. For the purposes of record production, the issues that were specifically excluded were as important as those included.

The ABCA allowed the appeal, holding that the Panel erred by confining itself to information it had received under *Directive 056*. The ABCA concluded that the Appellant was entitled to the production of records relevant and material to the issues set out in the scoping decision regardless of the process by which the AER received them. The ABCA referred the matter back to the AER for further consideration and redetermination.

***Sabo v AltaLink Management Ltd.*, 2024 ABCA 179**

Authority – Compensation Award

Application

On appeal from AltaLink Management Ltd. ("AML"), the Alberta Court of Appeal ("ABCA") considered whether the Land and Property Rights Tribunal (the "Board") had the authority under s 25(1)(d) of the Surface Rights Act ("SRA") to award compensation arising from power transmission line structures that are not located on the area granted to the operator under a right of entry ("ROE") order ("ROE Order").

The Board concluded that it did not have authority under s 25(1)(d) of the SRA to award compensation arising from power transmission line structures that are not located on the ROE lands. The Board's decision was reversed on appeal by the Court of King's Bench.

Decision

The ABCA agreed with the hearing judge that the Board erred in its conclusion on the scope of its authority. The ABCA also found that the hearing judge erred in the manner in which he determined compensation. As a result, the ABCA allowed the appeal in that regard and returned the question to the Board to determine compensation in accordance with the principle enunciated in this decision, namely that compensation under s 25(1)(d) of the SRA for "nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator" is not restricted to operations on the area granted to the operator under the ROE Orders.

Pertinent Issues

The appellant AML is the operator of a power transmission line. The Board granted AML ROE Orders in respect of land owned by the respondent landowners. AML built the power transmission line structures on land that is adjacent to the land subject to the ROE Orders. The transmission structures are not located on the land subject to the ROE Orders (with one negligible exception).

The Board ordered compensation for amounts agreed upon by the parties. For example, some parties agreed to the amount of compensation for the value of the land taken by the ROE Orders. The parties did not agree on the compensation to be awarded under section 25(1)(d) of the *SRA*.

The ABCA held that it was necessary to consider the specific words used in the *SRA* to determine the proper interpretation of s 25(1)(d). According to the ABCA, the Board's line of reasoning hinged on its view that "injurious affection" is a subset of "adverse effect," even though "injurious affection" is not specifically mentioned or defined in the *SRA*. This resulted in the Board failing to consider the specific words of the statute, which error led the Board to misinterpret the scope of its authority to award compensation under section 25(1)(d) of the *SRA*.

The ABCA reviewed the relevant case law, including the Board's past decisions, and found that a person's statutory entitlement to compensation for "injurious affection" will depend on the specific statute at issue. Some statutes provide for compensation for "injurious affection" in general terms, in which cases it may be necessary to look to case law for the rules prescribing the circumstances where compensation can be recovered. However, the tests or pre-conditions developed in the case law dealing with claims of "injurious affection" are often created in the course of interpreting specific statutory language. As a result, it is generally unhelpful to look at how the term "injurious affection" has been interpreted by courts in other cases because the meaning ascribed to the term is necessarily statute and jurisdiction specific.

For the purposes of this appeal, the ABCA placed little significance on the term "injurious affection" since the term is not found within the *SRA* itself. The ultimate question for the court was whether, in determining what factors it may consider in awarding compensation, the Board's interpretation of s 25(1)(d) of the *SRA* was correct. In the ABCA's view, the Board's use of the term "injurious affection" steered the Board into error and caused it to depart from its statutory mandate to implement the express words of the statute. The Board and the courts must interpret s 25(1)(d) of the *SRA* by applying the ordinary rules of statutory interpretation with regard to the specific words used by the legislature. In this case, the court determined that the Board's reasoning was divorced from the words chosen by the legislature.

The ABCA concluded that, based on the ordinary meaning of the words, there are two components to section 25(1)(d) of the *SRA*. The first component, namely "the adverse effect of the area granted to the operator on the remaining land of the owner or occupant," is restricted to adverse effects that are attributable to the area granted to the operator. However, no such restriction is placed on the compensation that may be awarded under the second component, namely "the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator."

In summary, when considering compensation under section 25(1)(d) of the *SRA*, the Board has authority to consider matters arising from the operations of the operator on the lands that are not subject to the ROE order in question. The authority for that is found in the second component of section 25(1)(d) which provides that the Board may consider as a factor when awarding compensation, "the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator."

ALBERTA UTILITIES COMMISSION

***AUC Consultation on Rule 007 and Enhanced Interim Information Requirements*, Bulletin 2024-08**

Electricity Generation Inquiry – Facility Applications

AUC Consultation on *Rule 007*

All new power plant and energy storage facility applications filed on or after May 2, 2024, must satisfy the existing *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* ("*Rule 007*") and the enhanced interim information requirements, set out below.

In May 2024, the Alberta Utilities Commission ("AUC") announced its review of *Rule 007*, which included a series of consultations on specific topics.

Enhanced Interim Information Requirements

The AUC's interim *Rule 007* information requirements for new power plant applications related to agricultural land, viewscapes, reclamation security and municipal land use will continue to be required and additional information for reclamation security, namely:

- A third-party report estimating reclamation costs, including estimated salvage value of project components; and
- A security selecting explanation setting out priorities in bankruptcy and realization on the reclamation security upon project owner and operator default.

Rule 007 Oral and Written Consultation

Oral consultation: power plant applications, including renewables, May 29, 2024; energy storage facilities, June 3, 2024; and municipal issues, June 4, 2024.

Written consultation process: regarding the methodology for visual impact assessments, the draft municipal engagement form, and the appropriate value for the field of view glare assessment for solar power plant applications. Deadline for written submissions: September 3, 2024.

Next Steps

An AUC-retained external expert will propose a methodology for visual impact assessment, to be completed in the summer of 2024. The AUC will consider the expert's proposed methodology, along with any alternate methodologies or comments submitted by external parties through the written process: due September 3, 2024.

The AUC announced that its review and consultation process will not be limited to the topics identified in this bulletin. The AUC will also accept feedback on other aspects of *Rule 007* as part of this review, including comments on any ambiguities, requested clarifications or opportunities for increased efficiency.

After the consultation process is completed, the AUC will prepare a blackline version of *Rule 007* and post it on its website for written feedback.

***Direct Energy Regulated Services 2023-2025 Energy Price Setting Plan Minor Amendment*, AUC Decision 28902-D01-2024**

Rates - Adjustment

Application

The AUC approved the request from Direct Energy Regulated Services ("DERS") to amend the Confidential Schedule E of its 2023-2025 energy price setting plan ("EPSP").

Decision

The AUC approved the 2023-2025 EPSP in Decision 27950-D01-2023.

Pertinent Issues

In the current proceeding, DERS proposed to amend two tables in the Confidential Schedule E of the EPSP to allow for more even procurement of forward-market electricity hedge products. DERS submitted that, since the release of Decision 27950-D01-2023, it has experienced a significant reduction in the number of regulated rate option ("RRO") customers and a corresponding decrease in load. This has led to procurement occurring very early in the 120-day allowable price implementation period ("APIP"). DERS explained that, depending on the price trends throughout the APIP, the change in

customers and the corresponding load can create costs or benefits for customers. DERS also submitted that it cannot slow the procurement to match the APIP.

The AUC found that it was important for procurement to be spread out as evenly as practical over the 120-day APIP to smooth out spikes in the forward-market prices that may occur over the APIP. The AUC concluded that the proposed amendments resulted in more even procurement over the APIP avoiding full procurement being completed too early in the APIP.

***AUC-Initiated Review Under the Reopener Provision of the 2018-2022 Performance-Based Regulation Plans for ATCO Electric and ATCO Gas*, AUC Decision 28300-D01-2024**

PBR-Plans - Rate Adjustment

Application

This proceeding was a review initiated by the Alberta Utilities Commission ("AUC") under the reopener provisions of the ATCO Electric Ltd. ("AE") and ATCO Gas and Pipelines Ltd. ("AG"), (collectively, "ATCO Utilities") performance-based regulation ("PBR") plans for the 2018-2022 period ("PBR2").

Decision

The AUC found that, in 2021 and 2022, the PBR2 plans of the ATCO Utilities did not operate as intended and that their operation for those years was inconsistent with the incentives inherent in PBR. This resulted in the 2021 and 2022 rates the ATCO Utilities charged not being just and reasonable since customers were required to pay rates without receiving the benefit of a more efficient utility service. The AUC decided to reopen the ATCO Utilities' PBR2 plans and conduct a separate phase two proceeding to determine the quantum of the remedy and the mechanism for the implementation of the remedy.

Pertinent Issues

Background

AE and AG are regulated by the AUC under a performance-based regulation. PBR is intended to create incentives for regulated utilities to seek out ways to continue to deliver safe and reliable utility service at a lower cost by adopting more efficient business practices. If successful, they retain the increased profits generated by those cost reductions over a longer period compared to the cost-of-service regulation. However, those cost savings or other benefits must be allocated between the utilities and their customers.

The AUC implemented a PBR framework for the 2013-2017 term ("PBR1") in *Decision 2012-237*. The AUC established PBR plans for the 2018-2022 term in *Decision 20414-D01-2016 (Errata)* and for the 2024-2028 term ("PBR3") in *Decision 27388-D01-2023*.

For all PBR2 plans, an achieved return on equity ("ROE") that is 500 basis points above or below the approved ROE in a single year, or 300 basis points above or below the approved ROE for two consecutive years is sufficient to warrant consideration of reopening and reviewing a PBR plan. The reopener provisions were an essential element of the PBR2 plans, which acted as a safeguard against unexpected results, including results that would have a material impact on a utility or its customers when a problem arises in the design or operation of the plan.

ATCO Utilities

The ATCO Utilities triggered the reopener provisions of their PBR2 plans by exceeding the two consecutive-year 300 basis point threshold for 2021 and 2022 and the single-year 500 basis point threshold for 2022. The scope of the reopener provisions included both PBR design and operational problems. Returns that trigger the reopener provisions are not sufficient to demonstrate that there is a problem with the PBR plan. Consequently, the first phase of the reopener proceeding is in the nature of an inquiry and no party bears the onus to demonstrate whether there is a problem with a PBR plan that cannot be resolved without reopening and reviewing the plan.

This proceeding was the first phase of the reopener proceeding where the AUC assessed whether to reopen the PBR2 plans of AE and AG. The AUC considered whether there was a design flaw in the plans, whether there were operational problems with the plans, and whether any operational problems could be addressed through rebasing or other features of the PBR2 plans.

Design Flaw

Regarding the design of the PBR2 plans, the AUC concluded that the evidence in the proceeding did not support the conclusion that there was a flaw in the design of the ATCO Utilities' PBR2 plans.

Operational Problems

With regard to the operation of the PBR2 plans, the AUC found that the evidentiary gap between the ATCO Utilities' total cost savings and the cost savings that were either quantified or attributed to specific efficiency gains, was inordinately large. The magnitude of the savings that were neither quantified nor attributed to particular projects, programs or initiatives by the ATCO Utilities led the AUC to conclude that the savings achieved could not be attributed to utility-driven efficiency gains resulting from the incentives intended under PBR. The AUC, therefore, found that the PBR2 plans of AE and AG did not operate as intended in 2021 and 2022. As a result, the rates were not just and reasonable in those years because customers were required to pay rates without receiving the benefit of a more efficient utility service.

Addressing the Operational Problems

With regard to whether these operational problems could be addressed through rebasing or other features of the PBR2 plans, the AUC found that the exercise of rebasing was different from the exercise of determining whether a reopener was warranted and that the sharing of benefits through rebasing was not dispositive of whether or not there was a problem in the design and operation of a prior PBR plan. The AUC determined that other plan features were also not available to address the identified operational problems, given that nearly two years passed since the plans concluded. Consequently, the AUC held that there was a problem with the operation of the ATCO Utilities' PBR2 plans that could not be resolved without reopening and reviewing the plans.

Next Steps

Having determined that there was a problem with the PBR2 plans of both AE and AG, which warranted reopening those plans, the AUC set out the scope and preliminary process steps for phase two of the reopener review ("Phase 2"). The AUC stated that it will create a new Phase 2 proceeding, in which it will pre-register the ATCO Utilities and any interveners who wish to participate will be registered upon request.

In Phase 2, the AUC will reopen the ATCO Utilities' PBR2 plans. The scope of Phase 2 will be the determination of the appropriate remedy to address the problems identified in the first phase of the reopener proceeding. The AUC also authorized and encouraged the parties to commence a negotiated settlement process ("NSP") pursuant to *Rule 018: Rules on Negotiated Settlements* to attempt to reach an agreement on a proposed remedy that addresses the identified problems. The AUC did not exclude any matters from the NSP.

The AUC will provide details of further process steps following notice of whether the parties engaged in settlement discussions and, if so, once the outcome of that process becomes known. Phase 2 will address the quantum of the remedy and the mechanism for the implementation of the remedy. As such, the process steps will seek evidence and submissions that: (i) provide the proposed quantum of any adjustments, in dollars, broken out by utility, including to which period(s) they apply; (ii) explain the mechanism/methodology used to effect the remedy (including all necessary assumptions); (iii) clearly specify what evidence from the first phase is relied on to support or justify the proposed remedy and recovery mechanism; and (iv) justify the choice of methodology/mechanism, including an explanation of how it results in a just and reasonable outcome for the utilities and their customers.